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IN THE

Supreme Court of the United States

OCTOBER TERM, 1927

NO. 341

D. B. HEINER, Collector of United States Internal Revenue for the Twenty-Third District of Pennsylvania, Petitioner,

v.

JAMES R. TINDLE and THE UNION TRUST COMPANY OF PITTSBURGH, Coexecutors of the Last Will and Testament of Philander C. Knox.

BRIEF FOR RESPONDENTS.

JAMES WALTON,
524 Bakewell Building,
Pittsburgh, Pa.,
CLARENCE A. MILLER,
1319 F Street, N. W.,
Washington, D. C.,
Counsel for Respondents.

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BRIEF FOR RESPONDENTS.

The facts, statutes involved and questions presented are set forth accurately in petitioner's brief.

I.

Summary of Argument.

1. The purchase or building of a house for residential purposes is a transaction for profit.

2. In any event, where a taxpayer built a house for residential purposes in 1887-8, and in 1901 permanently abandoned it as a residence and thereafter, continuously and uninterruptedly held it for rental purposes, he thereby entered into a second transaction which was a transaction entered into for profit.

3. Excess of return over expenditure in a given transaction or series of transactions."

It also gives the following synonyms: Benefit, avail, service, improvement, advancement, gain, emolument.

"Profit" is variously defined as "any advantage, any acquisition of good, from labor or exertion."

32 Cyc. 585.

The above definitions should settle the question in favor of the right of the taxpayer to the credit, for how can it be doubted that a man, when he builds or buys a home, is doing so because of the advantages, benefits, valuable results, useful consequences, that he expects to flow from it?

But the petitioner contends that in spite of the fact that a taxpayer entered into the transaction for profit in the senses above expressed, he cannot deduct a loss thereon, unless he embarked on the venture also with the intent to obtain an excess of return over expenditure, or, in other words, to sell it for more than it cost him. Of course, it cannot be disputed that that idea will also qualify under the term "profit," but has the Government the right to pick out that one meaning, out of all the meanings that lexicographers and Courts give to the word, and say that that is the only one, which, if present in the mind of the taxpayer at the time of the acquisition, will entitle him to take credit for the loss?

Arguendo, we will concede the soundness, from a legal standpoint, of the proposition that a tax may be valid in spite of the fact that it is unfair and unjust according to the ordinary concepts of these terms, but no such construction should be placed upon a statute unless there is no escape from it, that is, unless it is so clear and unmis-

takable that there is no possible way out. If there is a doubt,—a substantial doubt,—if it is possible to draw a different meaning, which is more fair and equitable, that meaning should be drawn.

Quite aside from the facts that, (a), the benefit which Senator Knox undoubtedly expected to get when he built this house is a "profit" within the meaning given to that word by standard dictionaries, and Courts, and that, (b), if there should be some doubt about it, it should be resolved in favor of the taxpayer (who would have to pay a tax on the gain, if he made any), we have the powerful, if indirect, light thrown on this matter by the deduction allowed by the very next sub-division of this section of the Act, viz:

> "(6) Losses sustained during the taxable year of property not connected with the trade or business (but in the case of a non-resident alien individual only property within the United States) if arising from fires, storms, shipwreck, or other casualty, or from theft, and if not compensated for by insurance or otherwise."

This shows that Congress realized that a man's profit for a given year was fictitious, if we are to count only the gains he made in business, *et cetera,* and did not take into consideration the losses sustained by him on property owned by him which was not connected with his regular trade or business, *such as his dwelling house,* for instance.

Such an anomaly as that the taxpayer must report a profit on his dwelling, and may deduct a loss, if it is damaged by a casualty, but *may not* deduct a loss on a sale, cannot be imputed to Congress unless they said so in the most unmistakable language, and this they have not done.

It is absurd to suppose that Congress intended to give the taxpayer credit for a loss sustained on his dwelling house, if the loss resulted from fire, although its purchase was not, in the narrow sense of the term, a transaction entered into for profit, but not from the other cause, to wit: a sale. What reason would move Congress to permit the loss in the one case and not in the other?

> "A *narrow meaning of a word is rarely given a revenue statute,* and the adjudications uniformly hold that words of general description often embrace an unnamed article, or one that was not thought of by the enacting power at the time the act was passed."
>
> *American La France Co. v. Riordan,* 294 Fed. 567 (D. C. W. D. of N. Y. Nov. 7, 1923)

> "A statute should be so construed as to avoid unjust consequences; unless the language compels such a result, and construction should be given with reference both to the history of the legislation and to other section of the law *in pari materia.*"
>
> *Bankers Trust Co. et al. v. Bowers,* Collector, 295 Fed. 89 (C. C. A. 2nd Circuit)

Courts, in construing the exempting clauses of taxing statutes, are not required to hunt for an escape from an exemption, but will, where the intent to exempt clearly appears, give effect to such intent without evasion. The rule as to strict constructions will not be deviated from where it results favorably to the taxpayer.

> *Buchanan v. Knoxville & Ohio R. R. Co.,* 71 Fed. 324, 333, 6th C. C. A., 1895, before Taft, C. J. and Hammond and Severens, J. cited by Holmes Federal Taxes, 6th Ed. p. 1588, sec. 971, (Geo. E. Holmes, Esq., of the Advisory Tax Committee)

But, we submit, this general rule should not affect this case, in any event, for the reason that we are dealing with an income tax, a tax, not on gross, but on the net result obtained by subtracting certain credits from certain debits, items of expense and losses, from gains and profits. Both charges and credits are equally part of the warp and woof of this plan of taxation. Here a net figure is to be taxed, and there is no reason why the general rule of liberal construction should not be applied throughout. This is assuming that there is a doubt, from the language of the statute, whether the loss sustained by the taxpayer in the sale of his residence is deductible. We deny this, and contend that there is no doubt in view of, (1) the language of the act authorizing the deduction, (2) the fact that the profit on the sale of the house, if there had been a profit, would have to be included in the income; and, (3) the plainly allowable deductions under subdivision (6) of the same section of the act for loss of every other nature, character and description that might be sustained on the same house.

The learned Solicitor General assumes that the acquisition of a house for residential purposes is necessarily not a transaction for profit and bases his conclusion on the theory that since the savings in rent and other savings are family or living expenses, and are thus not permitted as deductions in making up an income tax return, therefore "that doesn't count". But the statute uses the word "profit" without restriction,—unqualifiedly. It doesn't read "profit as it is defined by this Act upon which the tax shall be computed." The effect of the Treasury Department's position is to make the statute read "transactions entered into *primarily* for *pecuniary* profit." The word "profit" as used in the statute means profit as it is ordinarily understood in every day transactions of business. To illustrate, the interest on municipal bonds is tax free,—does not have

to be included in statutory taxable income. But certainly a man who buys $100,000.00 of tax-free municipal bonds has none the less entered into a transaction for profit.

No less an authority than that high priest of thrift, Benjamin Franklin tells us that the purchase of a home is a most profitable transaction. Moreover, there isn't a question but what Senator Knox, a man of thrift and foresight, took into full account and consideration the ultimate sale possibilities of his property. No man, knowing the value of a dollar, ever bought or built a home with his eyes shut to the possibility or necessity of sale at some time in the future.

(c).

IF THE PURCHASE OF A RESIDENCE IS NOT A TRANSACTION ENTERED INTO FOR PROFIT.

Let us assume, for the purpose of immediate argument, that the Senator did build a house without any thought of pecuniary profit, that he had a definite and immutable intent to occupy it as a residence until he died, and under no conditions had there entered his mind any thought of selling the property if he might be able to effect such a sale advantageously at a profit. For the purpose of this case we can admit all of this as of the years 1887 and 1888 when he built the house, and as continuing until the year 1901. But in 1901, the original transaction terminated. He and his family moved out of the house. He first leased it for a period of three and a half years, then for a period of ten years, then made other leases running down to the year 1920, when the property was sold. Certainly the leasing of the property was a transaction—there can't be any question but what it comes within the definition of what constitutes a transaction; moreover, it is ridiculous to say that it was not a transac-

tion entered into for profit, when profit actually inured therefrom. He derived profit from the transaction in the way of rentals; furthermore, such rentals had to be included in his tax return and income tax paid thereon. A transaction from which profit is derived certainly can not be anything else than a "transaction entered into for profit."

The United States Board of Tax Appeals has held that a transaction may be entered into for profit at any time, and not solely at the inception of an undertaking. *Thomas F. Sheridan v. Commissioner of Internal Revenue,* 4. B. T. A. 1299.

The Circuit Court of Appeals for the Second Circuit, in *Wilson v. Eisner,* 282 Fed. 38, held that an enterprise may be one entered into as a business for profit as well as one entered into for pleasure.

(d).

THE REASONABLE AND LOGICAL INTERPRETATION OF THE STATUTE.

For a better understanding, let us take, by way of analogy, the case of a man who goes to the bank and withdraws $1,000.00 for the purpose of making a pleasure trip to Europe. That, of course, is not a transaction entered into for profit. Before his departure he is solicited to buy some stock in the Hokum Land Company, which turns out to be worthless and he loses his entire $1,000.00. Is he precluded from taking a loss in his tax return because in the beginning it was a "transaction not for profit"? Certainly not, because it is obvious that there were two transactions. He first entered into a transaction "not for profit", but that terminated, and he then entered into a second transaction which was "for profit".

Or assume that the Revenue Act granted some particular exemption to all persons who had entered into the ministry. A certain taxpayer, claiming to be within this exemption, is able to prove that he did enter into the ministry in the year 1889. But subsequent thereto, in the year 1901, he abandoned the ministry and entered into a life of crime or some other activity and such was his admitted status as of the date of the passage of the Revenue Act. Could he, by any possible stretch of imagination, be considered as coming within the exemption? It is too plain for argument that his status as of the date of the passage of the Revenue Act would be looked to and be decisive as to whether or not he is entitled to the exemption.

By way of further analogy, let us assume that two men, Smith and Jones, are each the owners of seven-passenger Studebaker automobiles. Let us assume that the automobiles were purchased not for profit. Having heard the glowing tales of opportunity in Florida, these two men drive their cars from Pittsburgh to Florida. On arrival, they find that Florida is not as roseate as painted and, having limited means, they both go "broke". Smith and Jones, accordingly, drive their cars back to Pittsburgh and, being in need of immediate income, they take their cars and go into the automobile livery business, the carrying of passengers by automobile for hire. Under the Commissioner's interpretation of the statute, the two men would still be engaged in a transaction "not for profit" because the automobiles had originally been bought for pleasure purposes. If, however, they would simply go through the perfunctory motion of trading machines with each other, then, according to the Commissioner, they would be held to be engaged in a transaction "for profit". After this trade, what had before been the pleasure automobile of the one would become the "business" automobile of the other, despite the fact that the two machines were absolutely identical in make, character and description. The

interpretation of a statute which leads to such incongruities and absurdities as this surely will not find favor in the eyes of any court.

> "In the matter of taxation, there should be a rigid adherence to facts. It is from fiction that the evils of double taxation arise. The present tendency of our Supreme Court is to adhere to the facts, and this appears in the decision of the Supreme Court in *Hostetter's Estate,* 267 Pa. 193-196."
>
> *Commonwealth v. Presbyterian Hospital,* 287 Pa. 49.

(e).

WHAT IS REQUIRED TO PUT AN END TO A TRANSACTION "NOT FOR PROFIT"?

Certainly it will be conceded that if a man disposes of his residence through a sale in fee simple that puts an end to the transaction "not for profit". If he disposes of it through the conveyance of his life estate, that, too, I think the learned counsel for the Commissioner will concede, terminates the transaction "not for profit". If he leases the former residential property for 99 years, surely it must be admitted that puts an end to his transactions "not for profit". What if he leases for 50 years, or 25 or 10? Just where is the line of demarcation which we can put our finger on and say the conveyance of an estate to this extent terminates a transaction not for profit, but the conveyance of this lesser estates leaves the transaction "not for profit", still going on—still in existence. Senator Knox leased it to Corey for 10 years. If that lease is not of sufficient length of time to end the transaction "not for profit", would 30 years have done it? Where is the line of distinction? By this simple illustration we expose at once the whole fallacy of the petitioner's contention. If

instead of renting his former residence in the year 1901, with some few alterations in the structure of the building, Senator Knox had transformed the building into an apartment hotel, would he still be engaged in a transaction not for profit? Or if he had built an office building upon the property, what would the status have been then?

(f).

REGULATIONS AS COMPARED WITH STATUTE.

The learned Solicitor has fairly stated (p. 3 and 4, his brief), that the original regulations were changed on January 28, 1921.

A regulation which attempts to decree that a tax does or does not accrue under a certain statute, is not a regulation within the proper meaning of the term, even if it is so labeled by the Department. The proper function of a regulation, adopted pursuant to the statute, is to assist in the enforcement of the law, *not to declare substantive law.* If it is nothing more than an opinion that a certain transactions results in a tax. We must look to the law, and not to the so-called regulation, for the real authority.

We have seen that the trend of this legislation has been toward more liberality for the taxpayer. In striking contrast are the regulations. While Congess has been trying to deal more liberally with taxpayers, the Treasury Department's regulations have had a trend which is the exact converse.

The first regulations was as follows:

"A loss in the sale of an individual's residence is not deductible."

Art. 141, Reg. 45, Prelim. Ed. Feb. 25, 1919.

The same Article, of the same numbered Regulation of Jan. 28, 1921, reads as follows:

> "A loss on the sale of residential property is not deductible unless the property was purchased or constructed by the taxpayer with a view to its subsequent sale for pecuniary profit."

It is no difficult matter to determine what an individual's residence is. But, on the other hand, it is a most difficult thing to determine what is in a man's mind when he purchases or builds a house. Under the second interpretation, the Treasury Department proposes to determine a man's tax liability by finding out what his intentions were at some distant time in the past—by reading his mind, as it were. If the man is alive and able to testify, he can defend himself. But if he is dead when the case comes to trial, as Senator Knox was, the taxpayer is simply at the mercy of the Treasury Department.

The statute has not changed, but the interpretation has. The simple *ipse dixit* that "a loss in the sale of an individual's residence is not deductible," without qualification or explanation, was found to be unsuitable or inadequate, so another attempt was made *to express the idea of the Department* as to what the statute means. The term "individual's residence" is abandoned, and "residential property," whatever that may mean, was substituted for it, and the taboo was cut down by the addition of "unless the property was purchased or constructed by the taxpayer with a view to its subsequent sale for pecuniary profit."

The first change was probably due to the desire to include within their *own* prohibition the case of a man who sold a house which he had *formerly* used as a residence, and which might therefore escape through an unsophisticated inspector or examiner interpreting "an individual's residence" to mean the residence of that individual, and

not a house which he was renting out, or devoting to some other profitable use, but which he had used as a residence twenty years ago. If that was not the purpose sought to be accomplished by that change, we are at a loss to understand the reason for substituting for the simple, easily understood expression "an individual's residence," the uncertain expression "residential property." A block of dwelling houses or an apartment building, may be argued by some people to be "residential property." This would necessitate superimposing an explanation upon an explanation, a new, (third) regulation to clarify the meaning of the previous, (second) regulation, which took the place of the first regulation, which was intended to construe or explain a provision in a statute which needed no explanation.

The cause of the second change, the addition "unless the property was purchased or constructed by the taxpayer with a view to its subsequent sale for pecuniary profit," is also apparent. The Treasury Department realized how absurd it was to make such a sweeping ruling that "a loss in the sale of an individual's residence is not deductible," without anything more, when the Act plainly says "that losses sustained . . . if incurred in any transaction entered into for profit . . ." shall be deductible. So it created a deductible class by annexing what *it considered* a paraphrase of the language of the statute. And here we have, what generally follows, when an attempt is made to state, in different language, a plain expression,—more confusion. The Treasury Department has created two classes of owners, one, which purchases, or constructs, a house *without* "a view" to subsequently re-selling it "for pecuniary profit," and the other which purchases or constructs *with* such a view. But the party most interested, the home owner, cannot prove what the view was. The Treasury Department says that the presumption is that he belongs to the ~~second~~ first group, and will not permit him "to over-

come (it) by his self serving declaration, uncorroborated, that his purpose was otherwise." (*Sol. L. Op.* 780, 1 C. B. 117.

The above quotation, as to the presumption that applies, and character of proof required to overcome it, is all the more remarkable when we read what precedes it in the opinion:

> "Few, if any, transactions are 'entered into' other than for profit of some kind, but clearly the profit contemplated by the statute is to be pecuniary in character and not simply the pleasure or recreation of the individual, such as his private residence must be to him."

If we understand the musings of the writer of that opinion, it is something like this: *"Few, if any,* persons enter into transactions (and among transactions we will also include purchase of homes) without the expectation or hope of making something, which we admit is a *profit of some kind,* but, before we will allow a man to deduct a loss he has sustained in the sale of his house, we must determine his *object or intent* in buying or building the house. Furthermore, we are to be guided by this general rule in determining the question whether he is to have the deduction, that if he has held the property *out of use* (we presume this means that he has quit using the property as a residence), and uses it as a store or warehouse, or rents it to some one, there *would seem little room for question* that the transaction was entered into for profit, and his loss is to be deducted. In determining his intent, the presumption is the other way,—that he acquired the house without an intent to make profit, (in other words, that he belongs to the *"few, if any,"* class), and that presumption is so powerful that we must not allow him to overcome it by his own declaration or affidavit." (Words in italics are taken from opinion).

Right here we invite attention to the fact that the Treasury Department not only takes the narrow view that "profit" means "pecuniary profit," but narrows the meaning of the words "pecuniary profit" to mean increase in selling price over cost. If a man buys a home, because he thinks that the interest on the investment plus taxes, etc., will still amount to less than the rent he is paying, is not that a transaction entered into for pecuniary profit? And if, in connection with that idea, he also indulges in the hope that he may sell at a profit when he is through with it,—a profit taking into consideration the money he has saved over the rents that he would have paid, there can be no question that the transaction was for pecuniary profit. This Court will take judicial notice of the fact that many people have bought homes, and many others will buy homes, from that motive. Builders, knowing this, advertise, "Buy a home and pay for it out of rents." But the Treasury Department ignores this well known fact, assumes erroneously that the great majority do not have such ideas of thrift, and considers that presumption so strong as not to allow the party concerned to establish it by his own statement. What they would consider corroboration affords a subject for speculation. If he made statements at the time, would they be admissible? And would they divide his motive into major and minor purposes, and what percentage would they assign to each?

It is interesting to observe the conflicting decisions that have been made as a result of the first wrong start the Treasury Department made by its interpretation of the statute:

> "A loss sustained from the sale of property acquired by gift, bequest, devise, or descent (whenever property so acquired is, as a matter of fact, acquired for purposes of profit) is a deductible loss from gross income. Ordinary investment property so acquired is to be treated as having been acquired for purposes of

profit unless the conduct of the recipient furnishes evidences to the contrary."

Advisory Tax Board Rec. 35, 1 C. B. 122.

"A loss sustained upon the sale of residential property acquired by devise was held to be deductible by a taxpayer who soon after acquiring the property placed it with a broker for rent and for sale."

Appeal of Robert Williams, Executor Estate Ellen C. Bonaparte, 1 B. T. A. 1101.

"No deductible loss was sustained by a donee on the sale of a gift in 1919 for less than the cost to the donor and its March 1, 1913 value because the property was not originally acquired by the donee with a view to profit, it having been used as his residence from time of acquisition in 1902 until 1911, when it was rented."

Mandel v. Com., 4 B. T. A. 1001.

and, also,

"A loss upon the sale of taxpayer's residence is not deductible even as to the portion attributable to cost of improvements *made with a view to selling the house* when he continued to reside in it until the sale." (Italics ours).

Appeal of Madden, 2 B. T. A. 702.

In the first above cited, it is held that if a man obtains a house for nothing by gift or devise, and sells it at a "loss," he is entitled to claim a deductible loss, (and no mention is made that this is so only in case he does not use it as a residence), because the Treasury Department decided this should be treated as a transaction entered into for profit. But if he pays for it, he is not entitled to such consideration. It is then not a transaction entered into for profit.

In the second case, the same principle is applied.

In the third case the principle is not applied, and the only difference between it and the second case is something that happened *after* the transaction was entered into; in the former, the owner put it in the hands of a broker to sell, while in the latter he lived in it for a while. But, it will be observed, the use or non-use of the house as a residence was not considered of importance in the first case. When two men find themselves made richer by each being made the devisee of a house, and they both succeed in selling them at about the same time, but one lived in his house, and the other did not live in his, why should the latter be favored over the former so far as receiving a deduction for a loss? It is a piling of Pelion upon Ossa in this structure of error.

(g).

RE-ENACTMENT OF THE STATUTE WITHOUT CHANGE DOES NOT IN THIS INSTANCE INDICATE CONGRESSIONAL KNOWLEDGE OR APPROVAL OF REGULATIONS.

Counsel's argument to the affirmative of this proposition is on pages 7, 14 and 15.

To say that the reenactment of Section 214 (a) (5) of the Revenue Act of 1918, without change, in the Revenue Acts of 1921, 1924 and 1926 indicates that Congress intended to approve and adopt the second interpretation placed upon that section by the Treasury Department is not justifiable.

There is no basis in fact for an assumption that the members of Congress had actual knowledge of these regulations, and were satisfied with them, and, therefore, made no change in the act. We all know that changes in legislation are brought about, principally, in these ways: Either it appears that the effect of a statute, or portion

thereof, is such as to be unsatisfactory to a great number of people, resulting in the creation of a great public sentiment for a change, or some of the leaders in Congress reach the conclusion, for one reason or another, that a change is desirable.

When the time for the enactment of these various revenue laws seemed propitious, the Treasury Department drafted what it conceived should be the form of the new law. In the Treasury Department draft of these several revenue laws no change whatsoever was proposed in so much of Sec. 214 (a) (5) as is before this Court for interpretation. This is shown by Confidential Committee Print No. 1 of H. R. 8245, page 37, July 28, 1921; by Confidential Committee Print No. 1 of H. R. 6715, page 64, December 17, 1923; and by Confidential Committee Print No. 1 of H. R. 1, December 4, 1925. These are the Treasury Department drafts of the Revenue Acts of 1921, 1924 and 1926, respectively. There is nothing in the hearings, the debates in Congress, or the Committee reports on these various bills that would indicate that the interpretation which the Treasury Department had placed upon Sec. 214 (a) (5) of the Revenue Act of 1918 was ever brought to the attention of the Members of Congress, or that they, or any of them, knew what interpretation had been placed upon that section.

Unfair interpretations of a law which affect a relatively small number of people have little chance of being brought to the attention of the leaders in charge of the proposed act. The victims of the improper construction are unorganized. They have felt the force of the ruling and its force has been spent. When it is a question that affects a great number, it forces itself upon the attention of Congress, and the change may be made. But the number of people who have been denied a deduction for a loss sustained upon the sale of a residence is small, and a portion

of that number probably never stopped to consider that the Department's construction of the statute was wrong. They were incapable of having such ideas, because they were not sufficiently informed. It is extremely unlikely that Congress ever heard of these Regulations and rulings made thereunder, for if they had, we would like to have a good reason why they should be satisfied with a provision that allows a deduction for a loss to a man's residence by fire, or other casualty, and a construction of another provision denying a loss through the sale thereof. And if the answer be, that they make a distinction between a loss sustained through a sale, and through a casualty, we ask further, if that be so, why then do they allow a loss sustained in the sale of a residence if the owner received it as a gift, (as they rule in the case of the *Appeal of Robert W. Williams, Executors, supra*), but not if he purchased or built it?

The contention of the learned Solicitor General that reenactment by Congress impliedly validates the Treasury Department's interpretation may well be answered in the words of this court:

> "The government calls attention to the fact that, as early as October 24, 1919, the Commissioner of Internal Revenue made the ruling pursuant to which the tax here in question was assessed; that on March 22, 1920, the Attorney General sustained that ruling; that the provisions here in question were re-enacted without substantial change in the Revenue Act of 1921; and that the administrative practice adopted in 1919 has been steadfastly pursued. It suggests that these facts imply legislative recognition and approval of the executive construction of the statute. But the construction was neither *uniform, general,* nor *long continued.* Neither is the statute ambiguous. Such departmental construction cannot be given the force and effect of

law. Compare *U. S. v. Falk*, 204 U. S. 143, *Natl. Lead Co. v. U. S.* 252 U. S. 140."

Iselin v. U. S., U. S. Supreme Court, decided March 1, 1926, 270 U. S. 245 (Brandeis, J.)

(h).

THE BOARD OF TAX APPEALS INTERPRETATION OF THE STATUTE.

The learned Solicitor General has fairly and correctly pointed out (Br. 9, 15) that the Board of Tax Appeals, after nearly a dozen decisions following the interpretation of the Treasury Department, has finally reversed itself and adopted the interpretation which the taxpayer is here contending for.

See:

Appeal of Walter J. Ball, 8 B. T. A. 180.

(i).

THE VALUE AT DATE OF CONVERSION FROM RESIDENTIAL PROPERTY TO BUSINESS PROPERTY IS IMMATERIAL.

Counsel's argument is that the value in 1901, at date of conversion being lacking, it thus becomes impossible to reconcile the Circuit Court of Appeals' decision with *United States v. Flannery*, 268 U. S., 98 and *McCaughn v. Ludington*, 268 U. S., 106, (p. 17 and 18 his brief). Yet on page 13 bottom, he says:

"The Act contains nothing to warrant the determination of gain or loss on the basis of value as of the date when property, acquired and used as a private residence, is leased to others."

That is true,—precisely true. Then why ask this court to be concerned about the value as of the date of leasing? Counsel wants the court to interpret the statute as though

it read "losses sustained only to the extent accrued while a transaction was producing a net revenue." The wording of the statute is not so. It reads "losses sustained * * * if incurred in any transaction entered into for profit." The question is then,—were we engaged in a transaction entered into for profit. We were, and therefore we may take the loss as sustained. The manner and method of computing the loss has been specifically defined by this court in the *Flannery* and *Ludington* cases, *supra,* and it is measured by the difference between the selling price and the cost or March 1, 1913 fair value whichever is lower. It was so computed by the Circuit Court of Appeals and in no income tax case since has a value as of any other different date been considered. Counsel points out (p. 7 and p. 12) the administrative difficulties which would arise if the value at date of conversion had to be resorted to. He is absolutely right,—indescribable confusion would result. Yet he contends that the statute must be so interpreted (p. 18).

It is respectfully submitted that the proper basis for ascertaining the loss is the value of the property on March 1, 1913, since the value on that date is lower than the cost. *The United States v. Flannery, McCaughn v. Ludington, supra.*

(J).

EVEN IF WE ASSUME ARGUENDO THAT THE VALUE AT DATE OF CONVERSION IS A FACTOR.

What the value of the property was in 1901, at date of conversion to rental property, is at best only a moot question here. We know from the findings of fact (p. 21, transcript) that the cost in 1887-8 was $172,000.00, that in 1901 Senator Knox leased the property for $8,000.00 a year, in 1905 he had to reduce the rent to $6,500.00 a year, and in 1915 he had to make a further reduction of rent to $6,000.00. And we know the March 1, 1913 fair value was

$120,000.00. It is unmistakably evident from the decreased rentals that the property was decreasing in value from the time the Senator first rented it in 1901. The only possible way,—accepting counsel's ingenious theory of the case, that the value at date of conversion could become a factor would be that such value was less than the March 1, 1913 value. On the face of the facts that is utterly impossible. To have utilized the value at date of conversion would have resulted in a greater deductible loss for tax purposes than the Senator claimed.

(k).

CONCLUSION.

In conclusion it is respectfully submitted that the judgment of the Circuit Court of Appeals for the Third Circuit should be affirmed.

Respectfully submitted,

JAMES WALTON,
524 Bakewell Building,
Pittsburgh, Pa.

CLARENCE A. MILLER,
1319 F Street, N. W.,
Washington, D. C.
Counsel for Respondents.

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